

**Appeal No. 2004AP267**

**Cir. Ct. No. 2003CV1288**

**WISCONSIN COURT OF APPEALS  
DISTRICT IV**

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**CITY OF JANESVILLE,**

**PLAINTIFF-RESPONDENT,**

**FILED**

**V.**

**APR 21, 2005**

**CC MIDWEST, INC., A FOREIGN CORPORATION,**

Cornelia G. Clark  
Clerk of Supreme Court

**DEFENDANT-APPELLANT.**

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**CERTIFICATION BY WISCONSIN COURT OF APPEALS**

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Before Vergeront, Lundsten and Higginbotham, JJ.

Under Chapter 32 of the statutes governing eminent domain, specified units of government may force a business to vacate its premises if, among other requirements, the business is offered a “comparable replacement business” property. The meaning of the statutory phrase “comparable replacement business” is at the heart of this case. In the view of the City of Janesville, a “comparable replacement business” property may be substantially different from a business’s current property and, in fact, may be vacant land. Our review of the statutes and case law tells us there is substantial uncertainty about the meaning of “comparable replacement business.” At the same time, how “comparable replacement business” is defined has important implications for affected businesses and the ability of various units of government to condemn property for

the public good. Because of the statewide consequences of a decision on this topic, we certify this case.

## FACTS

CC Midwest, Inc., is a trucking company specializing in the pick-up and delivery of small loads. Its operation requires a docking configuration that facilitates the efficient transfer of loads from one truck to another. CC Midwest contends that it requires twenty “cross-docks” and a large surrounding area for parking, storing, and maneuvering large trucks.

CC Midwest rented its business property. The City of Janesville condemned that business property and assumed ownership in February 2003. CC Midwest temporarily remained as the City’s tenant.

In October 2003, the City sued under WIS. STAT. § 32.05(8) (2003-04)<sup>1</sup> to evict CC Midwest from the premises, so that the City could proceed with a planned road project. At issue in the subsequent litigation was whether the City provided CC Midwest with a “comparable replacement” property. The provision of a “comparable replacement” property is a prerequisite to a § 32.05(8) eviction. During summary judgment proceedings, the City contended that it had met its burden by making available a number of suitable properties in south central Wisconsin for either lease or purchase. Some of the properties were vacant land, zoned for trucking operations, upon which CC Midwest could construct a facility. Others had structures on them, including limited truck-docking facilities. It is

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

undisputed, however, that none were suitable for CC Midwest's operations without substantial construction and renovation. The trial court granted the City a writ of assistance based on its conclusion that the City provided CC Midwest with comparable replacement properties despite the unsuitability of those properties for CC Midwest's operation without costly improvements. CC Midwest appeals.

## DISCUSSION

The occupant of condemned premises need not vacate those premises until the condemning authority makes available a "comparable replacement property." WIS. STAT. § 32.05(8)(c). For businesses, a "comparable replacement property" is a "comparable replacement business" property under WIS. STAT. § 32.19(2)(c). Section 32.19(2)(c) defines a "comparable replacement business" as

a replacement business which, when compared with the business premises being acquired by the condemnor, is adequate for the needs of the business, is reasonably similar in all major characteristics, is functionally equivalent with respect to condition, state of repair, land area, building square footage required, access to transportation, utilities and public service, is available on the market, meets all applicable federal, state or local codes required of the particular business being conducted, is within reasonable proximity of the business acquired and is suited for the same type of business conducted by the acquired business at the time of acquisition.

At first blush, the terms in this definition such as "reasonably similar" and "functionally equivalent" might appear to provide adequate guidance as to whether a property is a "comparable replacement business" property. But we think this case demonstrates that the terms lack obvious meaning. Our review of the context of the statute and legislative history does not provide an obvious resolution to the ambiguity we perceive.

Here, CC Midwest requires a particular docking configuration, and it is unreasonable to think that the City could locate an existing facility that would satisfy a narrow interpretation of “comparable replacement business” property. This is especially true if, as CC Midwest argues, comparability is related to statutory financial relocation assistance, which is limited. *See* WIS. STAT. § 32.19(4m)(a) and (4m)(b) (which limits the replacement expenses a condemnor must pay to no more than \$50,000 for displaced owners of condemned property, and no more than \$30,000 for displaced renters of condemned properties). The sort of narrow interpretation of “comparable replacement business” suggested by CC Midwest would seemingly pose an insurmountable hurdle to many desirable public projects. At the same time, the statute does appear to contemplate that a condemning authority must provide a highly comparable replacement property. But just how comparable that property must be is far from clear.

The meaning of “comparable replacement business” property is an issue both when a business owns and when it rents. The most prominent prior decision on this topic involved an owner, *Dotty Dumpling’s Dowry, Ltd. v. Community Development Authority*, 2002 WI App 200, 257 Wis. 2d 377, 651 N.W.2d 1, *review denied*, 2002 WI 121, 257 Wis. 2d 118, 653 N.W.2d 890 (No. 2001AP1913). Both parties dispute the meaning of our decision in *Dotty*. The City of Janesville relies on *Dotty* to support its contention that making vacant or nearly vacant land available to CC Midwest satisfied its statutory burden. In *Dotty*, however, we did not address the meaning of “comparable replacement business” because of the way the parties in that case framed their arguments. The condemnee in *Dotty* argued that under WIS. STAT. § 32.05(8) “a court may not grant a condemnor possession of condemned premises until a replacement property deemed acceptable by the condemnee is procured, regardless of its

acquisition costs, all of which the condemnor must bear or tender.” *Dotty*, 257 Wis. 2d 377, ¶26. We simply held that the condemnor need only satisfy the statutory criteria, and has no “‘open ended obligation ...’ to provide business relocation payments regardless of the cost to the condemnor.” *Id.*, ¶27. We did not resolve what level of comparability suffices under the already-existing criteria.

Still, given the factual backdrop in *Dotty*, where the record indicated that the cost to purchase and remodel the offered replacement property would have been almost \$1 million more than the condemning authority made available to the business in its condemnation award and proposed relocation assistance payments, *id.*, ¶4, the City of Janesville here argues that we approved the notion that a property may satisfy the statutory criteria, even though substantial costly renovation of the replacement property is required.<sup>2</sup> It is hard to reconcile the City’s reading with the definitional terms such as “reasonably similar” and “functionally equivalent” found in WIS. STAT. § 32.19(2)(c).

We conclude that the statutory language at issue in this case is ambiguous. The construction of the statute will likely involve a judicial discernment of the policies the legislature had in mind when enacting the statutes.

CC Midwest also argues that if any of the properties offered by the City of Janesville is a “comparable replacement business” property under WIS. STAT. § 32.19(2)(c), then the statute, as applied here, results in an unconstitutional taking under the Fifth Amendment to the United States Constitution and article I,

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<sup>2</sup> WISCONSIN STAT. § 32.19(4)(c) demonstrates a clear legislative intent to limit payments to displaced business owners by expressly providing an exception to the relocation payment limits for persons displaced from their residences where no comparable replacement dwelling is available.

section 13 of the Wisconsin Constitution. This part of CC Midwest’s argument is not well developed, but the taking issue suggests that the interpretation of the statutory phrase “comparable replacement business” should be viewed in the larger context of the transaction. A condemning authority initiates condemnation proceedings under WIS. STAT. § 32.05 by making a jurisdictional offer to compensate the land owner. The statutes at issue here, § 32.19, *et seq.*, deal with limited compensation expenses associated with relocating the ongoing *business*. As a practical matter, compensation for real estate under § 32.05 may affect the financial ability of a business to relocate. The business in this case, CC Midwest, is a tenant. If CC Midwest was not entitled to receive compensation under § 32.05—something not apparent to this court—that fact may make CC Midwest’s argument about how the relocation statute was applied here seem more compelling. In *Dotty*, the owner of the business received approximately \$580,000 for the business property it owned, money available, obviously, to assist the business in relocating. In this case, CC Midwest is a tenant. Most of the properties offered by the City of Janesville needed to be purchased and modified by CC Midwest.

This case presents an opportunity to clarify a condemnation statute of ongoing statewide concern. For the reasons discussed, we certify this case to the supreme court.

